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2008 NOV 26 P 4: 06,

PUBLIC UTILITIES
COMMISSION

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of

PUBLIC UTILITIES COMMISSION

DOCKET NO. 2008-0274

Instituting a Proceeding to Investigate
Implementing a Decoupling Mechanism for
Hawaiian Electric Company, Inc., Hawaii Electric
Light Company, Inc., and Maui Electric Company,
Limited

**HAWAIIAN ELECTRIC COMPANY, INC., HAWAII ELECTRIC LIGHT
COMPANY, INC., AND MAUI ELECTRIC COMPANY, LIMITED'S
MEMORANDUM IN OPPOSITION TO TAWHIRI POWER LLC'S
MOTION FOR ENLARGEMENT OF TIME TO FILE MOTION TO
INTERVENE AND MOTION TO INTERVENE**

AND

CERTIFICATE OF SERVICE

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HAWAIIAN ELECTRIC COMPANY, INC. ("HECO"), HAWAII ELECTRIC LIGHT
COMPANY, INC. ("HELCO"), and MAUI ELECTRIC COMPANY, LIMITED ("MECO")¹
respectfully submit this Memorandum in Opposition to Tawhiri Power LLC's ("Tawhiri")
Motion for Enlargement of Time to File Motion to Intervene ("Enlargement Motion") and
Motion to Intervene ("Motion to Intervene"), dated November 17, 2008.²

¹ HECO, HELCO and MECO are collectively referred to as the "HECO Companies" or "Companies".

² The Enlargement Motion and Motion to Intervene were served upon HECO by mail on November 17, 2008. Hawaii Administrative Rules ("HAR") § 6-61-41(c) states: "An opposing party may serve and file counter affidavits and a written statement of reasons in opposition to the motion and of the authorities relied upon not later than five days after being served the motion" HAR § 6-61-22 states: ". . . When the prescribed time is less than seven days, Saturdays, Sundays, and holidays within the designated period shall be excluded in the computation" HAR § 6-61-21(e) states: "Whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other document upon the party and the notice or document is served upon the party by mail, two days shall be added to the prescribed period." Seven days from November 17, 2008, excluding Saturdays, Sundays and holidays, is Wednesday, November 26, 2008. Therefore, this Memorandum in Opposition to the Enlargement Motion and Motion to Intervene is timely filed.

With respect to the Motion to Intervene, Tawhiri should not be permitted to intervene as a party, or in the alternative, to participate without intervention in this docket,³ as: (1) Tawhiri has not demonstrated that it possesses expertise, knowledge or experience such that it could assist in the development of a sound record regarding the development and implementation of a decoupling mechanism; (2) Tawhiri has not demonstrated that participation with respect to its interest in selling “wind generation to HELCO” and “protecting its property and financial interests” would not unduly broaden the issues or delay the proceeding; (3) Tawhiri has not demonstrated that its interest in decoupling will not be adequately represented by the Consumer Advocate; and (4) Tawhiri’s Motion to Intervene is not timely.

In addition, Tawhiri’s Enlargement Motion should be denied, as Tawhiri has not made a showing of excusable neglect.

I. TAWHIRI’S MOTION TO INTERVENE

A. BACKGROUND

In its Order Initiating Proceeding, filed October 24, 2008 in Docket No. 2008-0274 (“Initiating Order”), the Commission opened this docket for the purpose of examining the implementation of “a decoupling mechanism for the HECO Companies that would modify the traditional model of ratemaking for the HECO Companies by separating the HECO Companies’ revenues and profits from electricity sales.” *Id.* at 9, para. 1.

The Initiating Order also recognized that decoupling is, in essence, a form of ratemaking: “Included in the [HCEI Agreement⁴] is a commitment by the HECO Companies to modify their traditional rate-making model by implementing a decoupling mechanism. Generally, decoupling

³ See Motion to Intervene at 7 (requesting participant status in the event the Motion to Intervene is denied).

⁴ The October 20, 2008 *Energy Agreement Among the State of Hawaii, Division of Consumer Advocacy of the Department of Commerce and Consumer Affairs, and Hawaiian Electric Companies* is referred to as the “HCEI Agreement”.

is a regulatory tool designed to separate a utility's revenue from changes in energy sales.” Id. at 2.

Further, the Initiating Order recognized the need to expeditiously develop a decoupling mechanism to facilitate the interim decision in HECO's 2009 test year rate case: “[T]he HECO Companies and the Consumer Advocate agreed that ‘[t]he revenues of the utility will be fully decoupled from sales/revenues beginning with the interim decision in the 2009 Hawaiian Electric Company Rate Case (most likely in the summer of 2009).’” Id. at 4. To that end, the Commission indicated that “to expedite this process, the commission will direct the HECO Companies and the Consumer Advocate to submit to the commission a joint proposal on decoupling that addresses all of the factors identified in their Agreement within sixty days of the date of this Order.” Id. at 5.

B. STANDARD FOR INTERVENTION AND PARTICIPATION

Motions to intervene are governed by the Rules of Practice and Procedure Before the Public Utilities Commission, Title 6, Chapter 61, HAR (the “Commission’s Rules of Practice and Procedure”), which pertain to intervention as a party as well as participation without intervention. Tawhiri has labeled its motion as a “Motion to Intervene” filed pursuant to HAR § 6-61-55. Under HAR § 6-61-55(a), “A person may make an application to intervene and become a party by filing a timely written motion . . . stating the facts and reasons for the proposed intervention and the position and interest of the applicant.”

In the alternative, Tawhiri has requested that the Commission grant Tawhiri participant status.⁵ Under HAR 6-61-56(a), “The commission may permit participation without intervention”⁶ in connection with a motion brought pursuant to HAR § 6-61-56(c).

⁵ See Motion to Intervene at 7.

⁶ Emphasis added.

The general rule with respect to intervention (or participation), as stated by the Hawaii Supreme Court, is that intervention “is not a matter of right but is a matter resting within the sound discretion of the Commission.” In re Hawaiian Electric Co., 56 Haw. 260, 262, 535 P.2d 1102 (1975); see Re Maui Electric Co., Docket No. 7000, Decision and Order No. 11668 (June 5, 1992) at 8; Re Hawaii Electric Light Co., Docket No. 6432, Order No. 10399 (November 24, 1989) at 5-6.

The Commission exercises its discretion by determining whether or not a movant should be admitted as a party in a proceeding. HAR § 6-61-55(d) specifically states: “Intervention shall not be granted except on allegations which are reasonably pertinent to and do not unreasonably broaden the issues already presented.” Re Hawaii Electric Light Co., Docket No. 7259, Order No. 12893 (December 2, 1993).

In addition, the Commission needs to “secure the just, speedy and inexpensive determination of every proceeding,” which is the purpose of the Commission’s Rules of Practice and Procedure as stated in HAR § 6-61-1. However, the “just, speedy and inexpensive determination” of a proceeding cannot be accomplished if the Commission admits every movant into the proceeding.

C. TAWHIRI’S MOTION TO INTERVENE SHOULD BE DENIED

Based on the standards set forth above, Tawhiri has not justified its intervention, or in the alternative, participation without intervention, in this docket, and thus the relief requested in its Motion to Intervene should be denied.

1. **Tawhiri Has Not Demonstrated that it Possesses Expertise, Knowledge or Experience such that it Could Assist in the Development of a Sound Record Regarding the Development and Implementation of a Revenue Decoupling Mechanism.**

HAR § 6-61-55(b)(6) requires that motions to intervene make reference to “[t]he extent

to which the applicant's participation can assist in the development of a sound record[.]”

Similarly, HAR §§ 6-61-56(c)(5) and (6) respectively require that motions to participate without intervention provide statements of (1) “the expertise, knowledge or experience the applicant possesses with regard to the matter in controversy;” and (2) “[w]hether the applicant can aid the commission by submitting an affirmative case.” With respect to these requirements, Tawhiri claims that it “possesses the experience and background needed to assist the Commission in developing a sound and accurate evidentiary record.” Motion to Intervene at 5. This argument is both unsupported and unconvincing.

As stated above, this docket involves the investigation of “a decoupling mechanism for the HECO Companies that would modify the traditional model of ratemaking for the HECO Companies by separating the HECO Companies’ revenues and profits from electricity sales.” Initiating Order at 9, para. 1. However, Tawhiri’s Motion to Intervene does not indicate how Tawhiri could contribute to a discussion on developing and implementing a decoupling mechanism.

Tawhiri has not discussed or provided any examples of any substantive expertise, knowledge or experience that it may possess regarding decoupling, which as discussed above, involves severing the economic linkage between utility revenues and sales. In addition, the Motion to Intervene does not specifically identify any of Tawhiri’s potential witnesses, or any experience with decoupling and/or ratemaking issues that might assist in the development of a sound record.

Indeed, the only factual allegation made by Tawhiri in connection with its “experience and background” is that, “Movant has provided HELCO with renewable wind energy since 2007” Motion to Intervene at 5. However, Tawhiri provides no indication of how providing

wind energy to HELCO might translate into expertise, knowledge and experience with regard to the technical ratemaking issues concerning revenue decoupling.

2. **Tawhiri Has Not Demonstrated that its Intervention or Participation Would Not Unduly Broaden the Issues or Delay the Proceeding.**

A motion to intervene or participate without intervention must refer to “[t]he extent to which the applicant’s participation will broaden the issues or delay the proceeding.”

HAR § 6-61-55(b)(7); see HAR § 6-61-56(c)(3).⁷ With regard to this requirement, Tawhiri contends that its intervention would not unduly broaden the issues or delay the proceeding.

Tawhiri’s contention is unconvincing and contradicted by Tawhiri’s allegations in the Motion to Intervene.

Tawhiri’s claimed “interest” in this proceeding is predicated on its status as “a QF that sells its wind generation to HELCO” pursuant to a power purchase agreement (“PPA”). Motion to Intervene at 3; see id. at 2, 4-7. Tawhiri’s contention as to why its interests cannot be represented by other parties to this docket is telling, as Tawhiri claims that its –

interests cannot be fully represented by any of the existing parties in the Docket because none of those parties share the same property and financial interests as Movant. Neither the HECO Companies nor the Consumer Advocate currently has a PPA to provide energy to a regulated utility. They clearly do not share Movant’s interest in protecting its property and financial interests to ensure that it may continue to provide renewable wind energy to HELCO in an economically viable manner and to promote wind energy in the State of Hawaii.⁸

However, Tawhiri’s interests in selling “wind generation to HELCO” and “protecting its property and financial interests” are not reasonably pertinent to the ratemaking issues concerning the development and implementation of the decoupling mechanism to be addressed in this docket. Accordingly, addressing Tawhiri’s interests would unduly broaden the issues and delay

⁷ HAR § 6-61-56(c)(3) requires that a motion for participation without intervention “provide . . . [t]he extent to which the participation will not broaden the issues or delay the proceeding.”

⁸ Motion to Intervene at 5.

the proceeding.

Revenue decoupling, as discussed above, is targeted at severing the economic linkage between utility revenues and sales. Thus, revenue decoupling relates to the recovery of costs for the provisioning of energy by utilities to their customers. Tawhiri's interests in selling "wind generation to HELCO" and "protecting its property and financial interests," by contrast, relate to the procurement of energy by utilities, which affects a different "side of the meter" than the ratemaking issues surrounding decoupling.

In addition, the Motion to Intervene makes the unsupported argument that independent power producers ("IPPs") with PPAs with the HECO Companies may somehow be impacted by this docket's examination of the development and implementation of a decoupling mechanism:

The instant Docket may adversely affect Movant's property and financial rights because the Decoupling Mechanism may: (a) shift some of the accounting risks and losses to Independent Power Producers ("IPPs") such as Movant should the collection losses and/or administration costs be allocated to them; (b) serve as a disincentive for the HECO Companies to acquire additional renewable energy from IPPs depending upon the economic considerations integrated therein; and (iii) decrease revenues and increase risks for IPPs with Power Purchase Agreements ("PPAs") if the transmission and distribution energy losses are assigned to them.

Motion to Intervene at 4. This argument is not persuasive and again illustrates that Tawhiri would unduly broaden the issues or delay the proceeding.

For example, Tawhiri provides no explanation of how establishing a decoupling mechanism would "shift some of the accounting risks and losses to Independent Power Producers ("IPPs") such as Movant should the collection losses and/or administration costs be allocated to them", or "decrease revenues and increase risks for IPPs with Power Purchase Agreements ("PPAs") if the transmission and distribution energy losses are assigned to them", or how these issues are related to this docket on decoupling.

3. Tawhiri Has Not Demonstrated that its Interest in Decoupling Will Not be Adequately Represented by the Consumer Advocate.

HAR §§ 6-61-55(b)(5) and 6-61-56(c)(4) require that motions to intervene or participate without intervention make reference to “[t]he extent to which the applicant’s interest will not be represented by existing parties[.]” In this regard, Tawhiri claims that the existing parties to this docket (which include the Consumer Advocate) cannot represent its interest. This argument is not persuasive.

First, as explained above, Tawhiri’s interest in selling “wind generation to HELCO” and “protecting its property and financial interests” are not reasonably pertinent to the ratemaking issues concerning the development and implementation of the decoupling mechanism to be addressed in this docket.

Second, the Consumer Advocate is “statutorily required to represent, protect, and advance the interest of all consumers.” HRS § 269-51 (emphasis added). Thus, the Consumer Advocate is required to ensure that the decoupling mechanism being investigated in this docket treats all consumers fairly. Given the Consumer Advocate’s resources, including the expertise, knowledge and experience it has gained as a statutorily-named party to countless utility ratemaking proceedings, this is a task to which the Consumer Advocate is well-suited.

4. Tawhiri’s Motion to Intervene is Not Timely.

Ordering Paragraph No. 4 of the Initiating Order states: “A motion to intervene or participate without intervention must be filed not later than twenty days from the date of this Order, pursuant to HAR § 6-61-57(3)(B).” The Initiating Order in this docket is dated October 24, 2008. Based on the language in the Initiating Order, Tawhiri’s Motion to Intervene was not timely filed. Thus, Tawhiri’s Motion to Intervene can only be granted in connection with an enlargement of time approved by the Commission upon a showing of “excusable neglect.” See

HAR § 6-61-23(a)(2). As further discussed in Part II below, however, Tawhiri's Enlargement Motion should be denied, as Tawhiri has not made a showing of excusable neglect.

D. TAWHIRI'S ALTERNATIVE REQUEST FOR LIMITED PARTICIPATION WITHOUT INTERVENTION SHOULD BE DENIED

As an alternative to being granted intervention as a party, Tawhiri argues that "the Commission should at least grant it Participant status and permit it to submit Position Statements and/or Testimony." Motion to Intervene at 7. However, Tawhiri should not be granted limited participation without intervention, as Tawhiri's Motion to Intervene does not satisfy HAR § 6-61-56, which governs motions to participate without intervention.

Tawhiri's Motion to Intervene does not provide any explanation as to why limited participation should be granted as an alternative to the full intervention that Tawhiri seeks. To the contrary, as discussed in the section above regarding Tawhiri's request to intervene as a party in this docket, the reasons alleged for intervention in Tawhiri's Motion to Intervene are largely unsupported, and in any event, do not demonstrate that: (1) Tawhiri possesses expertise, experience or knowledge with regard to the development and implementation of a decoupling mechanism; (2) Tawhiri's participation would not unduly broaden the issues or delay the proceeding; or (3) Tawhiri's interest in decoupling will not be adequately represented by the Consumer Advocate.

Indeed, in comparison to other instances in which the Commission has granted movants limited participation without intervention, Tawhiri's Motion to Intervene falls substantively short of justifying even limited participation in this docket. For example, as discussed above, Tawhiri's only factual allegation as to its expertise, knowledge and experience regarding revenue decoupling is that, "Movant has provided HELCO with renewable wind energy since 2007".

By contrast, for example, when the Rocky Mountain Institute ("RMI"), applied for intervention (but was granted limited participation without intervention)⁹ in HELCO's 2006 test year rate case, RMI provided specific examples of its experience, and the resources and expertise it could bring to that docket:

RMI has been on HELCO's advisory committee for three years, and extremely active in HELCO's Integrated Resource Planning process. RMI has taken the lead, on behalf of the HELCO Advisory Group members, in addressing all the substantive issues within the IRP process from demand, supply resources, fuel forecasts, and integration.

* * *

RMI is actively involved in the Act 95 Workshops and Docket No. 05-0069 (In the Matter of Hawaiian Electric Company, Inc. For Approval and/or Modification of Demand-Side and Load Management Programs and Recovery of Program Costs and DSM Utility Incentives). If RMI is granted party status, it plans to have several well-informed witnesses testify on pertinent issues. The list of witness includes, but would not be limited to, Kyle Datta, Carl Freedman, Joel Swisher, John Anderson, Jim Lazar and Natalie Mims.¹⁰

Thus, unlike Tawhiri's Motion to Intervene, RMI's motion to intervene in HELCO's 2006 rate case made a strong showing for its participation in that docket by identifying the pertinent substantive issues addressed by specific advisory committees, advisory groups, and workshops in which it had participated, and the names of witnesses it intended to call in order to assist in the development of a sound record. Tawhiri has made no such showing, and as a result, its alternative request for limited participation without intervention should be denied.

II. TAWHIRI'S MOTION FOR ENLARGEMENT OF TIME TO FILE MOTION TO INTERVENE

Ordering Paragraph No. 4 of the Initiating Order states: "A motion to intervene or participate without intervention must be filed not later than twenty days from the date of this

⁹ The Commission denied RMI's Motion to Intervene upon a finding that RMI's mission, stated expertise and appearances as a witness at public utility hearings were "not reasonably pertinent to HELCO's request for a general rate increase to justify full intervention in this proceeding." Order 22663 at 8.

¹⁰ RMI's Motion to Intervene and Become a Party, filed in HELCO's 2006 test year rate case, Docket No. 05-0315 at 5, 7.

Order, pursuant to HAR § 6-61-57(3)(B).”¹¹ The Initiating Order in this docket is dated October 24, 2008. Based on the language in the Initiating Order, Tawhiri’s Motion to Intervene was not timely filed.

As a result, Tawhiri has filed its Enlargement Motion based on Section 6-61-23(a)(2) of the Commission’s Rules of Practice and Procedure, which states in part:

Enlargement. (a) When by this chapter or by notice or by order of the commission, any act is required or allowed to be done at or within a specified time, the commission, for good cause shown may at any time, in its discretion:
* * *

(2) Upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect¹²

In its Enlargement Motion, Tawhiri contends that its –

Motion to Intervene is timely because public notice of the docket did not occur until October 29, 2008 when the Commission included an entry on the Order in its Daily Activity Report. Thus, Movant should have twenty (20) days from when the public notice was available instead of twenty (20) days from when the Order Initiating the Investigation was issued.

Enlargement Motion at 3.

Tawhiri’s Enlargement Motion should be denied, as Tawhiri has not made a showing of excusable neglect. In this case, a key fact in determining whether excusable neglect has been demonstrated is the point in time at which Tawhiri and/or its attorneys (listed as Sandra-Ann Y.H. Wong and Harlan Y. Kimura) initially actually learned of the Initiating Order. That fact is not included in the Enlargement Motion, Declaration of Counsel (Harlan Kimura)¹³ or Verification of Anthony B. Pace.

¹¹ HAR § 6-61-57(3)(B) provides:

(3) A motion to intervene or participate shall be served on all parties and the consumer advocate, and filed, in the proceedings . . . no later than:
* * *

(B) Twenty days after the commission orders an investigation including an investigation of a tariff change of an initial tariff filing. . . .

¹² (Emphasis added.)

¹³ A declaration of Sandra-Ann Y.H. Wong was not submitted.

Instead, the Enlargement Motion and Declaration of Counsel refer to the date that the Initiating Order was listed in the Commission's directory. If Tawhiri or its attorneys actually learned of the Initiating Order before the deadline to file a motion to intervene that was stated in the Initiating Order, then there may not be excusable neglect with respect to the timing of the filing of the Motion to Intervene. Given that the Enlargement Motion, Declaration and Verification do not discuss this key fact, Tawhiri has not demonstrated excusable neglect, and its Enlargement Motion should be denied.¹⁴

If the Enlargement Motion is denied, and it is determined that Tawhiri's Motion to Intervene was not timely filed, then its Motion to Intervene should also be denied as untimely. (Part I of this memorandum discusses the substantive reasons that the Motion to Intervene should be denied.)¹⁵

¹⁴ Page 9 of the Initiating Order and HAR § 6-61-57(3)(B) provide that the 20-day intervention period for filing a motion to intervene in this docket began to run on October 24, 2008 (i.e., the "date of" the Initiating Order). Notwithstanding this provision, Tawhiri argues that not allowing Tawhiri 20 days from October 29, 2008 to file its Motion to Intervene would "make a mockery of due process." Enlargement Motion at 4. This argument is unsupported, as Tawhiri has not alleged that it lacked reasonable actual or constructive notice of the November 13, 2008 filing deadline, as would be required to establish a procedural due process violation.

¹⁵ It should be noted that Tawhiri timely filed a motion to intervene in Docket No. 2008-0273, the Feed-In Tariffs docket, on November 13, 2008. The Commission initiated Docket No. 2008-0273 on the same day that it initiated this docket on decoupling.

Further, seven other entities including Life of the Land; Haiku Design and Analysis; Blue Planet Foundation; Hawaii Holdings, LLC; Hawaii Renewable Energy Alliance; the State of Hawaii Department of Business, Economic Development, and Tourism; and Hawaii Solar Energy Association filed timely motions to intervene in this docket.

III. CONCLUSION

Based on the foregoing, the HECO Companies respectfully request that Tawhiri's request to be granted intervention in this docket, or in the alternative, for limited participation without intervention, be denied.

In addition, Tawhiri's Motion for Enlargement of Time to File Motion to Intervene should be denied, as Tawhiri has not made a showing of excusable neglect.

DATED: Honolulu, Hawaii, November 26, 2008.

A handwritten signature in black ink, appearing to read 'Tom Williams', written over a horizontal line.

THOMAS W. WILLIAMS, JR.
PETER Y. KIKUTA
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HAWAIIAN ELECTRIC COMPANY, INC.,
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MAUI ELECTRIC COMPANY, LIMITED

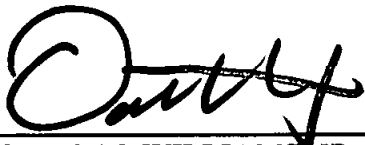
CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing HAWAIIAN ELECTRIC COMPANY, INC., HAWAII ELECTRIC LIGHT COMPANY, INC., AND MAUI ELECTRIC COMPANY, LIMITED'S MEMORANDUM IN OPPOSITION TO TAWHIRI POWER LLC'S MOTION FOR ENLARGEMENT OF TIME TO FILE MOTION TO INTERVENE AND MOTION TO INTERVENE, together with this CERTIFICATE OF SERVICE, as indicated below by hand delivery and/or by mailing a copy by United States mail, postage prepaid, to the following:

Hand Delivery	U.S. Mail	
X		Catherine Awakuni, Executive Director Department of Commerce and Consumer Affairs Division of Consumer Advocacy 335 Merchant Street, Room 326 Honolulu, Hawaii 96813
	X	Randall J. Hee, P.E. President and CEO Kauai Island Utility Cooperative 4463 Pahe'e Street, Ste. 1 Lihue, HI 96766-2000
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X		Kent D. Morihara, Esq. Kris N. Nakagawa, Esq. Rhonda L. Ching, Esq. Morihara Lau & Fong LLP 841 Bishop Street, Ste. 400 Honolulu, HI 96813

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	X	Sandra-Ann Wong, Esq. 1050 Bishop Street, No. 514 Honolulu, HI 96813
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DATED: Honolulu, Hawaii, November 26, 2008.



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